

STATE OF MICHIGAN
COURT OF APPEALS

MILEIDI MOYA-JURE and LAZARO RAVELO,

Plaintiffs-Appellees,

V

OMERO S. IUNG, M.D.,

Defendant-Appellant.

UNPUBLISHED

May 11, 2004

No. 245670

Ingham Circuit Court

LC No. 02-001325-MN

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order denying defendant's motion for summary disposition of plaintiffs' medical malpractice claim pursuant to MCR 2.116(C)(7). Defendant argues that the trial court erred as a matter of law when it denied defendant's motion for summary disposition. After reviewing applicable precedent we agree that the trial court erred, and reverse.

The relevant facts are not in dispute. Plaintiffs' claim for medical malpractice arises out of surgery performed on plaintiff Mileidi Moya-Jure on September 5, 2000. On March 1, 2002, plaintiffs filed a notice of intent to file suit. The notice period expired on September 1, 2002. On September 4, 2002, one day before the expiration of the statute of limitations, plaintiffs filed a complaint, but not an affidavit of merit as required by MCL 600.2912d. Plaintiffs subsequently filed an affidavit of merit on October 2, 2002, but had never filed a motion to extend the time for filing the affidavit.

Defendant moved for summary disposition on October 22, 2002, arguing that plaintiffs' claim was time-barred because they failed to file an affidavit of merit before the limitations period expired and because no motion to extend the time for filing, as permitted by MCL 600.2912d(2), had been granted before the deadline. On November 5, 2002, plaintiffs moved for an extension of time to file the affidavit of merit pursuant to MCL 600.2912d(2). The trial court conducted a hearing on both motions on November 22, 2002.

Defendant argued that summary disposition was compelled by this Court's decision in *Barlett v North Ottawa Community Hosp*, 244 Mich App 685; 625 NW2d 470 (2001). In *Barlett*, this Court held that the mere filing of a motion to extend the time for filing the affidavit of merit with the complaint was insufficient to toll the statute of limitations because only the granting of such a motion could toll the limitations period. *Id.* at 692. Here, the trial court

distinguished *Barlett* on the ground that the trial court in that case ultimately denied the motion to extend the time for filing the affidavit. The court reasoned that *Barlett* had no application to a situation where the trial court ultimately grants the motion to extend. Consequently, the court concluded that the holding of *Barlett* was mere dicta and granted plaintiffs' motion to extend, finding that there was good cause for the delay. *Id.* at 21. At the same time, the court denied defendant's motion. *Id.*

On appeal, defendant contends that the trial court erred in denying his motion because the holding of *Barlett* did not turn on whether the trial court eventually granted or denied the motion to extend time, rather, this Court simply held that the statute of limitations is not tolled unless a motion to extend time is granted within the limitations period. Because that did not happen in this case, defendant maintains that the trial court could not effect a retroactive tolling of the limitations period by granting the untimely motion to extend. Defendant also asserts that the court erred by finding that good cause existed to justify the late filing.

Plaintiffs argue that the trial court correctly concluded that this Court's decision in *Barlett, supra*, was not binding and distinguishable on its facts. Plaintiffs contend that defendant was not prejudiced by the late filing, and MCL 600.2912d neither requires that the motion be filed within the statutory limitations period nor provides for a penalty for late filing.

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Di Ponio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46-47; 631 NW2d 59 (2001), citing *Diehl v Danuloff*, 242 Mich App 120, 122-123; 618 NW2d 83 (2000). This Court must consider any pleadings, affidavits, depositions, admissions, or other documentary evidence that has been submitted by the parties. *Diehl, supra*, 242 Mich App at 123. Additionally, "[w]hether plaintiff's claim is statutorily time-barred is a question of law for this Court to decide de novo." *DiPonio, supra*, 246 Mich App 47, quoting *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

In MCL 600.2912d, the Legislature set forth the requirements for commencing a medical malpractice claim. That statute provides, in relevant part:

(1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or . . . the plaintiff's attorney *shall file with the complaint an affidavit of merit* signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.

* * *

(2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).

"The existing case law construing the statutory authority governing medical malpractice actions states that the failure to timely file a complaint *and* an affidavit of merit will not toll the applicable limitations period." *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002); see also *Scarsella v Pollak*, 461 Mich 547, 550; 607 NW2d 711 (2000); *Holmes v Michigan*

Capital Medical Center, 242 Mich App 703, 706-707; 620 NW2d 319 (2000). Although MCL 600.2912d(2) provides an additional twenty-eight days to file an affidavit of merit for good cause shown, the mere filing of a motion to extend the time for filing an affidavit of merit is insufficient to toll the statute of limitations. It is the granting, for good cause shown, of a timely noticed motion to extend the time for filing an affidavit of merit that tolls the period of limitation in a medical malpractice action. *Barlett, supra*, at 692-693.

Whether the trial court would have granted the motion to extend time was irrelevant to the decision in *Barlett, supra*. In that case, this Court's opinion was solely concerned with events occurring before the expiration of the limitations period that might have tolled it. In *Young, supra*, the plaintiff's attorney inadvertently failed to file the affidavit of merit with the complaint, even though it was completed, signed and notarized, and did not discover the omission until some time later. *Young, supra*, 254 Mich App at 448. The limitations period in that case expired on December 10, 2001, and the affidavit of merit was not filed until January 9, 2002, slightly more than twenty-eight days after the expiration of the limitations period. On January 14, 2002, the plaintiff moved for an extension of time to file the affidavit of merit, and, just as in this case, the defendant moved for summary disposition. The trial court in that case granted the motion to extend time and entered an order that allowed the date of filing of the affidavit of merit to be amended nunc pro tunc to the date of the filing of the complaint; accordingly, it also denied defendant's motion for summary disposition. *Id.* at 449. This Court reluctantly reversed on the basis of *Barlett, supra*, at 452. Such a result is also compelled by *Holmes, supra*, 242 Mich App at 709.

Plaintiff argues that *Young, supra*, is distinguishable because the affidavit of merit in that case was not filed within twenty-eight days of the date of filing of the complaint. However, this fact did not form the basis for this Court's decision in *Young*. Instead, it was the fact that the statute of limitations expired without an affidavit of merit having been filed or a motion to extend time to file the affidavit having been granted. *Young, supra*, is binding authority under MCR 7.215(I)(1). Consequently, the trial court erred in denying defendant's motion for summary disposition. The fact that it granted plaintiffs' motion to extend time for filing the affidavit of merit is irrelevant since the granting of the motion after the limitations period expired did not revive plaintiffs' claim. Furthermore, even if plaintiffs' claims could be revived by such a motion, the court gave no reasons whatsoever to support its finding that plaintiffs had shown good cause for the late filing, another fact distinguishing this case from *Young, supra*. Plaintiffs' attorney stated in the motion to extend time for filing the affidavit that he was waiting until after defendant's insurance company turned down the claim to obtain an affidavit of merit. The rejection of claim was sent on August 14, 2002, counsel went on vacation August 19, 2002, and he started to attend to the filing of the complaint and the securing of the affidavit of merit on August 26, 2002. However, there is no reason plaintiffs' attorney could not have obtained an affidavit of merit before rejection occurred given the fact that the affidavit of merit affiant provided expert assistance to counsel for plaintiffs in the preparation of the notice of intent, and particularly where the end of the limitations period was imminent.

Reversed.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Pat M. Donofrio